

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	)	
On Its Own Motion	)	
	)	
Notice of Inquiry into the need for an	)	
expedited hearings process for	)	04-NOI-01
complaints against an alternative gas	)	
supplier where the complainant seeks	)	
a cease and desist order under	)	
Section 19-120 of the Public Utilities	)	
Act	)	

COMMENTS OF PEOPLES ENERGY SERVICES CORPORATION

1 Pursuant to the Illinois Commerce Commission's ("Commission") August  
2 4, 2001 Notice of Inquiry ("NOI") and 83 Ill. Admin. Code Part 1700, Peoples  
3 Energy Services Corporation ("PE Services") hereby responds to the questions  
4 raised in the NOI.

5 The exact legal name of PE Services is Peoples Energy Services  
6 Corporation. PE Services is a corporation organized and existing under the laws  
7 of the State of Illinois, with its principal place of business at 130 East Randolph  
8 Drive, Chicago, Illinois 60601. PE Services is principally engaged in the  
9 business of providing energy services, including selling natural gas, to retail  
10 customers in Illinois. It is certified by the Commission as an "alternative retail  
11 electric supplier" ("ARES"), as that term is defined in Section 16-102 of the Illinois  
12 Public Utilities Act (the "Act")<sup>1</sup>, and as an "alternative gas supplier" ("AGS"), as  
13 that term is defined in Section 19-105 of the Act<sup>2</sup>.

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<sup>1</sup> 220 ILCS §5/16-102.

<sup>2</sup> 220 ILCS §5/19-105.

14 GENERAL COMMENTS

15 PE Services shares the Commission's concern that complaint cases  
16 against AGS and ARES be handled promptly. From the perspective of a  
17 competitive supplier, the uncertainty and delay that litigation often entails are  
18 disruptive, costly and unproductive. PE Services notes that Section 10-108 of  
19 the Act<sup>3</sup> contemplates that complaints will be completed within one year of filing.  
20 PE Services would not oppose a process that was designed to ensure that  
21 complaints against AGS and ARES were completed more promptly than  
22 complaints against public utilities.

23 Given the flexibility available under the Commission's existing rules to set  
24 procedural schedules that accommodate the needs of a particular complaint, it is  
25 unclear that a set of rules could be developed that would better serve the  
26 interests and protect the rights of parties to complaint cases. PE Services is  
27 aware of only three complaints under the Alternative Gas Supplier Law ("AGS  
28 Law"),<sup>4</sup> and none under the comparable statutory provisions applicable to ARES.  
29 Moreover, certain of the procedures that are cited in the NOI Appendix are  
30 barred by the AGS Law's requirement for notice and a hearing before the  
31 Commission imposes the remedies permitted by the AGS Law. At this time, it  
32 appears premature to adopt special rules. However, if the Commission elects to  
33 promulgate such rules, PE Services urges the Commission not to adopt rigid  
34 rules that preclude the ALJ from adopting procedural schedules and processes  
35 that are tailored to the specific complaint, nor to use Article XIII as a guideline.

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<sup>3</sup> 220 ILCS §5/10-108.

<sup>4</sup> 220 ILCS §5/19-100 *et seq.*

36 COMMENTS TO SPECIFIC QUESTIONS

37 1. a. Is there a need for the Commission to implement an expedited process for  
38 complaints filed under Section 19-120 of the Public Utilities Act [220 ILCS 5/19-  
39 120] in which the complainant seeks a cease and desist order? Please provide  
40 specific examples of Section 19-120 docketed proceedings before the  
41 Commission in which the lack of an expedited process resulted in denial of the  
42 relief sought by the complainant.

43 PE Services questions the need for special procedures to address the  
44 cease and desist provision in the AGS Law, as nothing in the Commission's  
45 current rules prevent the Administrative Law Judges ("ALJs") from setting  
46 expedited schedules. The complaint case docket before the Commission in  
47 which "cease and desist" relief has been requested is very limited. There is no  
48 evidence that the lack of an expedited process resulted in the denial of the  
49 "cease and desist" relief sought by the complainant, nor is there evidence of  
50 customer harm from the absence of special procedures to address such  
51 complaints. Indeed, in the only case in which the Commission issued an order,  
52 there was no finding of customer harm. Given this limited record and the  
53 absence of customer harm, it is premature to adopt special rules.

54 First, PE Services is aware of three complaints brought under the AGS  
55 Law for which a cease and desist order was requested.<sup>5</sup> In two of these cases,  
56 the ALJ set expedited schedules. The absence of special rules for handling  
57 these matters was not an obstacle. For example, in Docket 02-0425, a complaint  
58 was filed in June 2002, the complaint was amended and a motion for cease and  
59 desist was filed in July 2002 and the matter was set for hearing in November  
60 2002. No hearings were held. The complainant ultimately moved to dismiss the

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<sup>5</sup> Docket Nos. 02-0425, 03-0592 and 04-0034.

61 proceeding, with prejudice. Apparently, the matters at issue were addressed in  
62 another proceeding. However, the ALJ and the parties set a schedule that  
63 placed the case on a relatively quick path to resolution. In Docket 03-0592, the  
64 complaint was filed on September 30, 2003, a status hearing was held October  
65 6, 2003, an amended complaint was filed one month later, a hearing was held on  
66 November 21, 2003 and the record reopened for an additional hearing on  
67 January 9, 2004. Throughout this process, the respondent was engaged in  
68 lengthy discussions with the Commission Staff in an effort to resolve the issues  
69 raised in the complaint.<sup>6</sup> Although an order was not issued until July 2004, this  
70 delay was not attributable to the schedule on which the evidentiary phase of the  
71 case was conducted. Again, the ALJ and the parties set a schedule that placed  
72 the case on a relatively quick path to resolution. In the third case, Docket 04-  
73 0034, the complaint has been amended, there have been several procedural  
74 motions and there appear to be jurisdictional issues that have delayed the  
75 litigation of this case. Certainly, if the Commission's jurisdiction is in question,  
76 expedited procedures are not appropriate.

77 Second, in the only case, of which PE Services is aware, that has been  
78 fully litigated, Docket 03-0592, the record included no evidence of customer  
79 harm.

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<sup>6</sup> If the Commission wants respondents to work with its Staff to try to narrow or resolve complaints, it must take into account that such efforts can be time-consuming and lead to delay.

80 Third, the Electric Service Customer Choice and Rate Relief Law of 1997<sup>7</sup>  
81 includes a similar “cease and desist” provision,<sup>8</sup> and PE Services is aware of no  
82 complaints brought under that statutory provision.

83 In sum, there is no evidence that the absence of special rules to handle  
84 “cease and desist” requests has been detrimental to complainants, nor an  
85 impediment to the prompt resolution of complaint cases brought under the AGS  
86 Law. The Commission’s existing procedural rules give the ALJs ample discretion  
87 to prevent undue delay.

88 1.b. Should an “expedited” cease and desist process include an opportunity for  
89 “emergency” relief such as that which is available under Sections 13-514 and 13-  
90 515 of the Public Utilities Act when a competitive telecommunications carrier  
91 alleges that the anticompetitive actions of an incumbent carrier will cause  
92 irreparable harm to the complainant? As stated in the response to 1(a), there is  
93 no support for adopting special rules to handle cease and desist requests.  
94 However, were the Commission to adopt such rules, Sections 13-514 and 13-515  
95 of the Act are not apt analogies.

96 There are critical distinctions between Article XIII and Article XIX of the  
97 Act, and the Commission should not draw on Article XIII in fashioning a process.  
98 First, and most importantly, the emergency relief provided for in Section 13-  
99 515(e) expressly provides for relief “without an evidentiary hearing.”<sup>9</sup> By  
100 contrast, Section 19-120(c) of the Act expressly requires notice and hearing.  
101 Consequently, the Section 13-515 process cannot, through a rulemaking, be  
102 made applicable under the AGS Law.

103 Second, Sections 13-514 and 13-515 relate to a telecommunications  
104 carrier impeding competition. Were there an analogous provision in the AGS

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<sup>7</sup> 220 ILCS §5/16-101 et seq.

<sup>8</sup> 220 ILCS §5/16-115B(b)(1).

<sup>9</sup> “An order for emergency relief may be granted, without an evidentiary hearing, ... .” 220 ILCS §5/13-515(e).

105 Law, it would apply to public utilities. Instead, the AGS Law provides for the  
106 limited regulation of competitors, *i.e.*, entities seeking to compete in the  
107 unbundled market and not entities that can block competitors.

108 Finally, permitting emergency relief, without a hearing, would place the  
109 respondent at a competitive disadvantage based on allegations to which it had  
110 no or a limited opportunity to respond. For a natural gas supplier, timing is  
111 critical in ensuring that it can stand behind the price it offers. A cease and desist  
112 order based on little more than allegations of misconduct would be costly to a  
113 supplier. In particular, a supplier will have expended time and money on  
114 developing and marketing a product and may have procured supply that needs to  
115 be liquidated. There may also be opportunity costs resulting from such an order.  
116 If the supplier ultimately prevails in the case, this would not compensate for the  
117 lost costs stemming from the initial order. The Commission should be mindful of  
118 the unintended consequences of adopting processes that make it easy for a  
119 complainant to disrupt a competitive supplier's business on bare allegations of  
120 wrongdoing.<sup>10</sup> The potential for such disruption may discourage competitors  
121 from entering the market or cause suppliers to be overly cautious in developing  
122 and marketing new products and services.

123 1.c. Would the availability of an expedited or emergency cease and desist  
124 process under Article 19 be intended to prevent harm to competition in a manner  
125 similar to that provided in Section 13-515 of the Public Utilities Act? If so, please  
126 explain how a complaint *against* a competitive gas supplier is comparable to a  
127 complaint that is filed *by* a competitive telecommunications carrier against a

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<sup>10</sup> PE Services notes the express language in Section 13-515(i) that is intended to address frivolous complaints. Complainants under this section are certifying that a complaint is not being brought to harass or cause unnecessary delay in the provision of competitive services. 220 ILCS §5/13-515(i). These standards, while not spelled out in the AGS Law, should certainly apply to complaints under that or any other provision of the Act.

128 noncompetitive carrier.

129 No. As stated in the response to 1(b), Article XIX governs competitors  
130 who have no market power to impede competition. By contrast, Article XIII is  
131 directed at entities who may be able to impede competition.

132 1.d. What other purposes would be served by an expedited or emergency  
133 cease and desist process? For what other types of inappropriate activities could  
134 emergency cease and desist relief be requested? Is fraudulent marketing one  
135 such activity? Are there others? Should simply including the words “cease and  
136 desist” in a complaint be sufficient to initiate the emergency relief process and  
137 any deadlines associated with it?

138 For the reasons stated in the responses to 1(a) and (b), an expedited or  
139 emergency process is not needed. However, were the Commission to adopt  
140 such a process, simply including the words “cease and desist” in the complaint  
141 should not be sufficient to trigger an expedited or emergency process. The  
142 complainant should be required to plead with specificity why a cease and desist  
143 order is appropriate. The respondent must have sufficient notice of the  
144 complainant’s specific allegations to respond effectively. See the response to  
145 1(e).

146 1.e. If an expedited or emergency process were implemented, what standards  
147 would be applicable for granting emergency relief? Would a showing of  
148 irreparable harm and likelihood of success on the merits be required? Should  
149 anyone other than the entity being harmed be permitted to seek emergency  
150 relief?

151 The requested relief is comparable to a request for a temporary restraining  
152 order or preliminary injunction. Accordingly, the standard for granting such relief  
153 should be comparable. Under Illinois law, a complaint that requests injunctive  
154 relief must show the following four elements:

- 155 • That the plaintiffs possess a certain and clearly ascertained “right”  
156 which needs protection;

157           • That plaintiffs will suffer “irreparable injury” without the protection of the  
158           injunction ;

159           • That there is no “adequate remedy at law;” and

160           • That the plaintiffs are likely to be successful on the merits of his action.

161   Bromberg v. Whitler, 57 Ill App. 3d 152, 155, 372 N. E. 2d 837 (1978). These

162 standards would be appropriate for governing any emergency or expedited

163 process. Also, consistent with these standards, the entity alleging harm should

164 be the complainant with the burden of making these showings.

165   1.f. Does the Commission have the statutory authority to require the posting of  
166   a bond by the person requesting the emergency relief? If the Commission has  
167   the authority, what factors would the Commission consider in setting the amount  
168   of the bond?

169           PE Services has no opinion on this question.

170   2. In the absence of specific statutory authority mandating expedited  
171   proceedings, is there a statutory basis for expedited proceedings under Section  
172   19-120 of the Public Utilities Act? Please provide specific citations to any relevant  
173   Sections of the Public Utilities Act and the Illinois Administrative Procedure Act.

174           The authority and power of the Commission is guided by the Act. “The  
175   Commission, because it is a creature of the legislature, derives its power and  
176   authority solely from the statute creating it, and its acts or orders which are  
177   beyond the purview of the statute are void.” Chicago v. Illinois Commerce Com.,

178   79 Ill. 2d 213, 217-218 (1980) (citing People ex rel. Illinois Highway

179   Transportation Co. v. Biggs, 402 Ill. 401, 409 (1949)). As stated above, Section

180   19-120 of the Act requires notice and a hearing before the Commission takes

181   one of the actions authorized by the AGS Law. However, the ALJs have

182   considerable latitude in managing their dockets, including setting schedules.

183   See, e.g., 83 Ill. Admin. Code Part 200, Subparts C and D. As a check on that



discretion, a party that disagrees with an ALJ's decision can petition the Commission for interlocutory review. In fact, the ALJs have put expedited schedules in place for two of the complaints brought under the AGS Law.

3. a. Will expedited proceedings afford all parties to a complaint proceeding sufficient due process?

Without a specific proposal upon which to comment, PE Services cannot conclude that an expedited proceeding would protect the parties' due process rights. Moreover, the facts of a particular case may require discovery or raise additional issues that cannot be accommodated by an expedited schedule. However, as stated in the response to 2, the ALJs can establish an expedited schedule, and a party that believes the schedule deprives it of due process can petition the Commission. In other words, the Commission's current procedural rules and processes are sufficient to strike an appropriate balance between expediting proceedings and protecting parties' due process rights.

3.b. If an expedited or emergency process is implemented, what procedural steps would be appropriate to ensure that parties have a reasonable opportunity to participate and that an informed decision, based on evidence of record, can be reached? For example, should a reasonable opportunity for discovery be provided? Are some procedural steps required by statute or rule?

The AGS Law requires notice and a hearing before the Commission can impose any of the remedies provided in Section 19-120, including the issuance of a cease and desist order. The Commission's Rules of Practice are sufficient to cover the various types of hearings that may be appropriate. Whether discovery is necessary to protect due process rights likely depends on the facts of the case. For example, in Docket 03-0592, a case involving PE Services, the Commission Staff conducted discovery, but neither PE Services nor the complainant, the

210 Citizens Utility Board, conducted any discovery. Similarly, what evidence is  
211 needed will depend on the allegations in the complaint. The complexity and  
212 number of issues, as well as whether facts are in dispute, affect the type of  
213 hearing and the evidentiary record that must be developed. For example, in  
214 some complaint cases, evidence in the form of pre-filed written testimony may be  
215 the most effective way for the Commission to have a complete record before it,  
216 while in other cases, oral testimony or affidavits would be sufficient.

217 3.c. Would the expedited or emergency cease and desist relief be granted in  
218 an interim order? If so, is there a statutory basis for doing so?

219 The AGS Law requires notice and a hearing before the Commission can  
220 impose any of the remedies provided in Section 19-120, including the issuance of  
221 a cease and desist order. See the response to 1(e).

222 4. If an expedited proceeding is necessary, identify any current Commission rules  
223 that would need to be amended to provide for such a proceeding.

224 Commission rules do not need to be amended, as proceedings can be  
225 expedited as necessary under the existing rules. See the responses to 3(a) and  
226 3(b).

227 For the foregoing reasons, PE Services respectfully requests that the  
228 Commission not adopt special rules to govern complaints under the AGS Law.

Respectfully submitted,

Peoples Energy Services Corporation

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Dated at Chicago, Illinois this  
14th day of September, 2004